

STATE OF TENNESSEE

Office of the Attorney General



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Reply to:
Consumer Advocate and Protection Division
Post Office Box 20207
Nashville, TN 37202

April 7, 2003

Honorable Sara Kyle
Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

RE: In Re: Petition of Tennessee American Water Company to Change and Increase Certain Rates and Charges So As to Permit it to Earn a Fair and Adequate Rate of Return on Its Property Used and Useful in Furnishing Water Service to Its Customers
Docket No. 03-00118

Dear Chairman Kyle:

Enclosed is an original and thirteen copies of the Objections by the Consumer Advocate and Protection Division of the Office of the Attorney General to Tennessee American Water Company's Initial Request for Discovery. Kindly file same in this docket. If you have any questions, kindly contact me at (615) 532-3382. Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Shilina B. Chatterjee".

Shilina B. Chatterjee
Assistant Attorney General

Enclosure
cc: All Parties of Record

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**IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:

**PETITION OF TENNESSEE
AMERICAN WATER COMPANY TO
CHANGE AND INCREASE CERTAIN
RATES AND CHARGES SO AS TO
PERMIT IT TO EARN A FAIR AND
ADEQUATE RATE OF RETURN ON
ITS PROPERTY USED AND USEFUL IN
FURNISHING WATER SERVICE TO
ITS CUSTOMERS**

DOCKET NO. 03-00118

**OBJECTIONS BY THE CONSUMER ADVOCATE AND PROTECTION
DIVISION OF THE OFFICE OF THE ATTORNEY GENERAL TO TENNESSEE
AMERICAN WATER COMPANY'S INITIAL REQUEST FOR DISCOVERY**

Comes Paul G. Summers, the Attorney General & Reporter, through the Consumer Advocate and Protection Division of the Office of Attorney General (hereinafter "Consumer Advocate") and hereby objects to the discovery propounded upon the Consumer Advocate by Tennessee American Water Company ("TAWC"). The Consumer Advocate respectfully objects to the discovery requests filed by TAWC.

The TRA Rules state that any objections to discovery requests should be presented in accordance with the Tennessee Rules of Civil Procedure. Tenn. Comp. R. & Reg. 1220-1-2-.11(7). Therefore, the Tennessee Rules of Civil Procedure provide additional guidance concerning the scope of discovery before the TRA. Unless otherwise limited by order of the Court in accordance with these rules, the scope of discovery is to obtain relevant information. TENN. R. CIV. P. 26.02 states:

Rule 26.02 Discovery Scope and Limits.

(1) IN GENERAL. Parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objections that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

This allows the parties to obtain any information during discovery that is relevant and not privileged. TENN. R. CIV. P. 26.02(1). Nevertheless, the scope of proper discovery is not unlimited. Rule 26.02(1) states that there are limitations on the discovery of information that is unreasonably cumulative or duplicative, obtainable from other sources, or unduly burdensome.

Further, under the traditional practices and procedures of the TRA, discovery is not granted without a party demonstrating a need for discovery. In this matter, the information that TAWC is seeking is unreasonably cumulative, duplicative, obtainable from another source and unduly burdensome. TAWC should not be allowed to conduct discovery because TAWC has access to all relevant information concerning this matter.

The purpose of TENN. R. CIV. P. 26.02(1) is to allow for discovery of facts which “will enable litigants to prepare for trial free from the element of surprise . . .” *Strickland v. Strickland*, 618 S.W. 2d 496, 501 (Tenn. Ct. App. 1981). Discovery by TAWC is unnecessary since all relevant facts are in the hands of TAWC and there is no element of surprise from the Consumer Advocate in this docket.

Pretrial discovery is used to uncover information that will assist in defining or clarifying

the issues in the case or that will illuminate issues for a court in the administration or adjudication of the case.¹ The purpose of discovery is “to narrow and clarify the basic issues between the parties . . .”² In addition, the parties may use various methods of discovery. Rule 33.01 permits the parties to propound written interrogatories upon one another. TENN. R. CIV. P. 34.01 allows for requests to produce and permits inspection of documents. Where the party responding does not want to respond, the Tennessee Rules of Civil Procedure require that they may object to the request and state the reasons for the objection.³

The Tennessee Rules of Civil Procedure are broad and give the parties broad scope in the discovery process.⁴ Rule 26.02(1) of the Tennessee Rules of Civil Procedure permits the parties to obtain any information that is relevant and not privileged.⁵ Rule 26.02 was designed for the discovery of facts that enables the litigants to prepare for trial free from the element of surprise.⁶ Nevertheless, there are limits on discovery of information and the Tennessee Rules of Civil Procedure provide that discovery of information can be limited when it is unreasonably cumulative or duplicative, obtainable from another source or unduly burdensome.⁷ TAWC’s Discovery Requests are clearly unnecessary and frivolous based on a proper reading of the rules

¹ 6 Moore’s Federal Practice, §26.41[6][a], 26-115 (3rd ed.).

² *Interborough News Co. v. Curtis Publishing Co.* (S.D.N.Y. 1953) 14 FRD 408, 410.

³ TENN. R. CIV. P. 33.01.

⁴ *See Duncan v. Duncan*, 789 S.W.2d 557, 560 (Tenn. Ct. App. 1990).

⁵ TENN. R. CIV. P. 26.02.

⁶ *Strickland v. Strickland*, 618 S.W.2d 496, 501 (1981).

⁷ TENN. R. CIV. P. 26.02(1).

concerning discovery and the responses that have already been provided to TAWC.

Rule 26.02(1) states that discovery shall be limited by the court if it determines that: the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations of the parties' resources, and the importance of the issues at stake in the litigation."

The Consumer Advocate specifically objects to the following interrogatories:

TAWC'S DISCOVERY REQUEST NO. 1:

State in detail the legal and factual basis for any objection or opposition CAPD has with respect to any aspect of the rate increase requested by TAWC in this docket.

OBJECTION: The Consumer Advocate objects to TAWC's request to "state in detail the legal and factual basis" to the extent that it requests information such as legal research, confidential and privileged communications between counsel, or work product.

TAWC's request for "legal and factual basis" for any objection or opposition with any aspect of the rate increase is inappropriate. TAWC seeks legal authority, expert testimony, and specific references. Information is still being gathered at this time and legal and factual conclusions are still being reviewed, assessed and determined. Explanation of our "factual basis" may constitute legal advice and would also violate the attorney work-product privilege. Moreover, investigation is continuing in this matter, in particular, CAPD is awaiting responses to its discovery requests. For a response appropriate at this point in the proceedings, please refer to

the Consumer Advocate's filings herein. Once CAPD's discovery is received, the Consumer Advocate will attempt to respond as appropriately as possible.

TAWC'S DISCOVERY REQUEST NO. 2:

Identify each person whom you expect to call as an expert witness at any hearing in this docket, and for each such expert witness:

- (a) identify the field in which the witness is to be offered as an expert;
- (b) provide complete background information, including the expert's current employer as well as his or her educational, professional and employment history, and qualifications within the filed in which the witness is expected to testify, and identify all publications written or presentations presented in whole or in part by the witness;
- (c) provide the grounds (including without limitation any factual basis) for the opinions to which the witness is expected to testify, and provide a summary of the grounds for each such opinion;
- (d) identify any matter in which the expert has testified (through deposition or otherwise) by specifying the name, docket number and forum of each case, the dates of the prior testimony and the subject of the prior testimony, and identify the transcripts of any such testimony;
- (e) identify for each such expert any person whom the expert consulted or otherwise communicated with in connection with his expected testimony;
- (f) identify the terms of the retention or engagement of each expert including but not limited to the terms of any retention or engagement letters or agreements relating to his/her engagement, testimony, and opinions as well as the compensation to be paid for the testimony and opinions;

- (g) identify all documents or things shown to, delivered to, received from, relied upon, or prepared by any expert witness, which are related to the witness(es)' expected testimony in this case, whether or not such documents are supportive of such testimony, including without limitation all documents or things provided to that expert for review in connection with testimony and opinions; and
- (h) identify any exhibits to be used as a summary of or support for the testimony or opinions provided by the expert.

OBJECTION: The Consumer Advocate objects to this interrogatory on the grounds that this request is overly broad and burdensome. The interrogatory goes well beyond the discovery permitted pursuant to Tenn. R. Civ. P. §26.02(4)(A)(i). Further, discovery has just begun and is ongoing at present in this matter. Investigation by the Consumer Advocate is continuing and since the Consumer Advocate has not yet received initial responses to its discovery requests a great deal rests on the responses provided to its discovery requests by TAWC. At this time, it is not possible to address this interrogatory. Moreover, the basis for experts opinions will be set forth in prefiled testimony. The Consumer Advocate has not identified an expert to testify in this matter. Once the Consumer Advocate identifies an expert to testify in this matter, the procedure described in Tenn. R. Civ. P. §26.02(4).

TAWC'S DISCOVERY REQUEST NO. 3:

Please produce copies of any and all documents referred to or relied upon in responding to TAWC's discovery requests.

OBJECTION: It is not the duty or obligation of the Consumer Advocate to provide all documents referred to or relied upon in responding to TAWC's discovery request. Nevertheless, the Consumer Advocate will provide proper references on a limited basis where possible. It

would be duplicative for the Consumer Advocate to provide copies of any and all documents relied and referred to in answering TAWC's discovery requests.

The Consumer Advocate has not identified an expert to testify in this matter. Once the Consumer Advocate identifies an expert to testify in this matter, the procedure described in Tenn. R. Civ. P. §26.02(4).

TAWC'S DISCOVERY REQUEST NO. 4:

Please provide all material provided to, reviewed by or produced by any expert or consultant retained by CAPD to testify or to provide information from which another expert will testify concerning this case.

OBJECTION: The Consumer Advocate has not identified an expert to testify in this matter. Once the Consumer Advocate identifies an expert to testify in this matter, the procedure described in Tenn. R. Civ. P. §26.02(4).

TAWC'S DISCOVERY REQUEST NO. 5:

Please produce all work papers of any CAPD's proposed experts, including but not limited to file notes, chart notes, tests, test results, interview and/or consult notes and all other file documentation that any of CAPD's expert witnesses in any way used, created, generated or consulted by any of CAPD's expert witnesses in connection with the evaluation, conclusions and opinion in the captioned matter.

OBJECTION: The Consumer Advocate objects to this interrogatory on the grounds that the information sought is protected by attorney-client privilege and attorney work product doctrine. The Consumer Advocate objects to this request as it may be requesting legal research or work product of employees of the Consumer Advocate's office. As well, it may be unduly

burdensome to produce all such documents. Further objection is raised on the grounds that it is overbroad and unduly burdensome.

The Consumer Advocate has not identified an expert to testify in this matter. Once the Consumer Advocate identifies an expert to testify in this matter, the procedure described in Tenn. R. Civ. P. §26.02(4).

The Consumer Advocate responds by asserting work-product doctrine and privileges. Rule 26.02(5) states that “[w]hen a party withholds information otherwise discoverable under the rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege protection.” The purpose of work-product protection is to “promote the adversary system by safeguarding fruits of attorney’s trial preparations from discovery attempts of opponents.”⁸

The Consumer Advocate’s consultation and cooperative investigative work is privileged. In *United States v. American Telephone and Telegraph Company*, the court stated

The work-product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney’s trial preparations from the discovery attempt of the opponent. The purpose of the work-product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation. . . .

⁸

Edwards v. Whitaker, 868 F. Supp. 226 (M.D. Tenn. 1994).

United States v. American Telephone and Telegraph Company, 642 F.2d 1285, 1299-1301 (D.C. Cir. 1980)(emphasis added). Investigative techniques, legal strategies and theories is of the consultative nature intended to be covered by the work-product privilege. The Consumer Advocate has prepared reviewed, discussed, analyzed and exchanged confidential information and is protected by the attorney-client and work-product privileges.

TAWC'S DISCOVERY REQUEST NO. 6:

Please produce a copy of all trade articles, journals, treatises and publications of any kind in any way utilized or relied upon by any of CAPD's proposed expert witnesses in evaluating, reaching conclusions or formulating an opinion in the captioned matter.

OBJECTION: The Consumer Advocate has not identified an expert to testify in this matter. Once the Consumer Advocate identifies an expert to testify in this matter, the procedure described in Tenn. R. Civ. P. §26.02(4).

TAWC'S DISCOVERY REQUEST NO. 7:

Please produce a copy of all documents which relate or pertain to any factual information provided to, gathered by, utilized or relied upon by any of CAPD's proposed expert witnesses in evaluating, reaching conclusions or formulating an opinion in the captioned matter.

OBJECTION: The Consumer Advocate has not identified an expert to testify in this matter. Once the Consumer Advocate identifies an expert to testify in this matter, the procedure described in Tenn. R. Civ. P. §26.02(4).

TAWC'S DISCOVERY REQUEST NO. 8:

Please produce a copy of all articles, journals, books or speeches written by or co-written by any of CAPD's expert witnesses, whether published or not.

OBJECTION: The Attorney General objects to this request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. Additionally, this request is overbroad and unduly burdensome, and is not intended to lead to admissible evidences. The articles that are relevant to expert witness testimony will be produced.

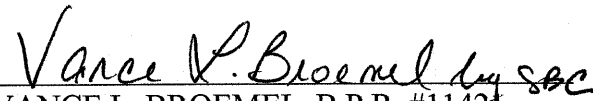
Finally, the overall breadth of the interrogatories propounded by TAWC appear to be an unnecessary burden upon the Consumer Advocate. Discovery was designed to prevent the tactic of ambush by trial. At its heart, discovery is a process that allows neither party to employ evidence in a trial that the opposing party has never examined. There can be no ambush in this matter when the documents and facts the Consumer Advocate relies on come from the record which is open and available for inspection to the general public.

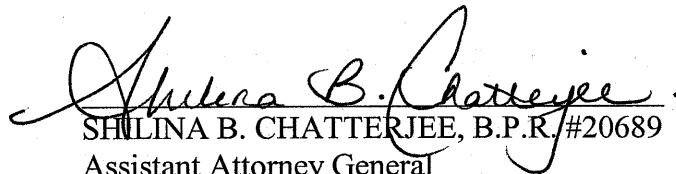
The Consumer Advocate has not identified an expert to testify in this matter. Once the Consumer Advocate identifies an expert to testify in this matter, the procedure described in Tenn. R. Civ. P. §26.02(4).

As to all of the above requests, the Consumer Advocate must reiterate that under Tennessee Code Annotated § 10-7-504(5)(A), any books, records or materials in the possession of the Office of Attorney General and Reporter that relate to any pending or contemplated legal or administrative proceeding in which the office is involved is not open for public inspection. Any work product of any attorney working under the Attorney General and Reporter's supervision and control is not open for public inspection.

For the foregoing reasons, the Consumer Advocate respectfully requests that the hearing officer consider the above and grant the objections stated by the Consumer Advocate.

RESPECTFULLY SUBMITTED,

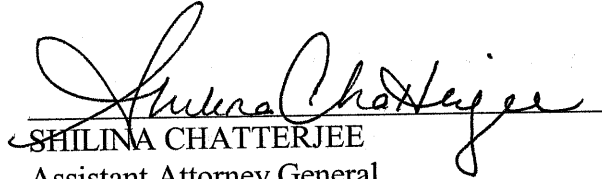

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Dated: April 7, 2003

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first-class mail, postage prepaid, to T.G. Pappas, George H. Masterson, R. Dales Grimes, Attorneys at Law, Bass, Berry & Sims, PLC, AmSouth Center, 315 Deaderick Street, Suite 2700, Nashville, Tennessee 37238-3001, on this the 7th day of April, 2003.


SHILINA CHATTERJEE
Assistant Attorney General

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